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August 19, 1975

75-278
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ARIZONA ATTORNEY GENERAL

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Phoenix, Arizona 85015

Honorable Gerald F. Moore
3321-A West Vermont
Phoenix, Arizona 85017

Re: House Bill 2179 (1975) -- Appropriation for Additional
Retirement Benefits

Gentlemen:

With reference to your letter of June 11, 1975, regarding the constitutionality of House Bill 2179 making an appropriation to the State Retirement System Board of \$635,000 for the purpose of paying a 5% increase in the rate of retirement payments payable to persons who are receiving retirement benefits from State Retirement System, the State Retirement Plan, or the Arizona Teacher's Retirement System on or before June 30, 1974, we offer the following opinion:

Although such legislation is obviously designed for the purpose of protecting those who have faithfully served the State for a number of years, in light of the recent inflationary trend experienced in our economy, such legislation is subject to potential constitutional attack on a number of grounds, including, but not limited to, the following:

1. Article 9, Section 7, Arizona Constitution, prohibiting the State from giving or loaning its credit or making any donations to any individual.
2. Article 4, Part 2, Section 17, Arizona Constitution, prohibiting the Legislature from granting any "extra" compensation to any public officer after services have already been rendered.
3. Article 2, Section 13, Arizona Constitution, prohibiting the enactment of any laws granting to any citizens privileges or immunities which upon the same terms do not equally belong to all citizens.
4. Article 4, Part 2, Section 19, Subdivision 13, prohibiting the enactment of any special laws granting to any individual any special or exclusive privileges, immunities or franchises.

The most frequent attacks upon statutes or ordinances increasing pensions have involved state constitutional provisions similar to our own prohibiting the use of public funds to make gifts or gratuities, the extension of state credit for private purposes, and the payment of "extra" compensation to public officers or employees. [27 A.L.R. 2d 1442, 1444. Annotation: "Validity of legislation providing for additional retirement or disability allowances for public employees previously retired or disabled". See also 118 A.L.R. 992. Annotation: "Increase of pension benefits as applicable to those already receiving benefits".] Our attention will, therefore, be focused upon those particular areas of possible constitutional vulnerability.

The annotation found at 27 A.L.R. 2d 1442 deals with the question of whether or not, where there is a general increase in the amount of benefits payable under a pension law, existing pensioners are entitled to claim such an increase. In that annotation the following general statement is made:

"Courts are not in accord as to whether or not a pensioner so situated is entitled to an increase in the amount of his pension."

This conflict in the authorities is also apparent from a reading of a discussion of the problem to be found in 60 Am. Jur. 2d, Pensions and Retirement Funds, §64, which discusses the validity of legislation increasing the amount of existing pension.

"Subject to restrictions upon interference with vested rights and other constitutional limitations, the legislature has the power to increase the amount of pensions payable for public employees previously retired or disabled. . . . In some jurisdictions, however, specific constitutional provisions prevent the payment of extra compensation to former public employees who have retired prior to the enactment increasing benefits. A distinction is sometimes made between plans funded by mandatory exactions which are therefore subject to constitutional limitations upon the uses of public funds, and plans based upon optional voluntary contributions, which give rise to a contractual relationship between

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contributor and sovereign admitting of an increase in benefits payable in the discretion of the legislature, since the fund is not public in nature." Ibid. at page 940, Krebs v. Board of Trustees, 410 Ill. 435, 102 N. E. 2d 321 (1951); Raines v. Board of Trustees, 365 Ill. 610, 7 N. E. 2d 489 (1936); See also, McQuillen, Municipal Corporations, Vol. 3, §12.157 (3rd Ed. rev.)

Although House Bill 2179 does not purport to grant pensions to persons already retired from public employment at the time of its enactment (but only to supplement existing pensions), this type of legislation would probably amount to a gratuity for private purposes in violation of Article 9, Section 7 of the Arizona Constitution. Police Pension Bd. of City of Phoenix v. Warren, 97 Ariz. 180, 398 P. 2d 892 (1965); Vol. I, Dillon on Municipal Corporations, 5th ed., §430.

One of the cases recognizing the distinction between plans funded by mandatory exactions and plans based upon optional voluntary contribution is Gorham v. Board of Trustees of Teacher's Retirement System, 190 N. E. 2d 329, 27 Ill. 2d 593 (1963). In that case certain acts granted certain benefits to retired public school teachers receiving pensions. The plaintiff, suing as a taxpayer to enjoin the disbursement of public funds, contended that the acts were unconstitutional in that the benefits provided constituted extra compensation to public servants after their service had been rendered. The acts in question had the effect of providing for supplementary retirement payments to retired school teachers, payable out of supplementary payment reserves, equal to fifty dollars for each year of service up to a maximum of \$2,250.00 per year. In order to qualify for the increase, teachers were required to contribute \$5.00 for each year of service, which contributions were wholly voluntary. Appellant taxpayers cited three cases holding that increasing pensions for retired public employees constituted the granting of extra compensation after services had been rendered, and were, therefore, a mere gift or gratuity in violation of Section 19, Article 4 of the Illinois Constitution. The court held, however, that these cases did not apply where the fund from which the increased payments were authorized was raised in part by voluntary contributions by the employees themselves. And that the election by the retired teachers to participate

in the increased benefits raised a contractual relation between the employee and the State, since it was entirely optional whether or not a particular teacher would participate in these additional payments. The court also noted that the contribution required of the teachers had a reasonable relationship to the amount of payments provided.

The court also noted that the classification of public school teachers as a distinct class for appropriate legislation could not be challenged under the equal protection clause of the Illinois Constitution. This holding lends credence to an assumption that the equal privileges and immunities clause of the Arizona Constitution, Article 2, Section 13, would not prohibit the enactment of House Bill 2179.

A review of several other pertinent decisions from various state courts accentuates the conflict of opinion among the various states with regard to the constitutionality of legislation similar to House Bill 2179. For example, in Jameson v. The City of Pittsburgh, 381 Pa. 366, 113 A.2d 454 (1955), the taxpayer sued to enjoin the defendants, the officials of the City of Pittsburgh, from implementing a statute increasing retirement pensions. The defendant municipality contended that since the legislation required a voluntary contribution of \$200 by the pensioner, the law created a contractual relation between him and the pension board and was, therefore, not violative of the constitutional prohibition against the granting of extra compensation to public employees [a contention similar to that successfully argued in Gorham v. Board of Trustees of Teachers' Retirement System, supra]. The court, however, held that the legislation violated the constitutional prohibition against giving extra compensation to public employees after services have been rendered since the law applied to all employees retired as of the time of the passage of the act. See also, Koehnlein v. Allegheny County Employees Retirement System, 373 Pa. 535, 97 A.2d 88 (1953). Concern was also expressed for the fiscal integrity of the retirement fund.

A contrary view, however, has been expressed by the California courts, which is exemplified by the recent decision of the California Court of Appeals in Nelson v. City of Los Angeles, 98 Cal. Rptr. 892 (1972). In that case, the petitioners, a member of the Los Angeles Police Department who retired in 1947 and the widow of a member of the Police Department who died while also employed in 1948, brought suit against the City of Los Angeles to compel compliance with certain

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charter amendments raising the minimum pension payable to persons in the petitioners' class from \$250 to \$350 per month and increasing the annual cost of living increments in the pension from 2-1/2% to 3%. Respondent City contended that the amendments were void to the extent that they apply to persons in a pensionable status prior to the effective date of the amendment because they conflict with a California constitutional provision strikingly similar to Article 4, Part 2, Section 17 of the Arizona Constitution. The California Court of Appeals, however, concluded that this increase in benefits payable to a city pensioner did not constitute "extra compensation", or an extra allowance prohibited by the Constitution. The court adhered to California case law precedents holding that additional benefits may constitutionally be provided for members of a retirement system who have acquired a pensionable status. Such monies are paid as a result of rights incident to that status and include not only the right to pensions as they exist at the time retirement is granted, but also the subsequent increases in pensions. Nor does such legislation violate the constitutional prohibition against the giving of public monies.

However, a New York court reached diametrically opposite conclusion in Burton v. City of Albany, 242 N. Y. Supp. 2d 510 (1963). In that case, the petitioner's husband retired from the police department of the City of Albany in 1946 and thereafter received a yearly pension of \$1,155.00 until he died in 1962. The 1940 pension law under which he was retired made no mention of widows of members. However, on January 7, 1952, a new law was passed by the City of Albany amending the 1940 legislation which authorized the payment of a widow's pension for the first time. Although the New York State Constitution contained provisions prohibiting the giving or loaning of money or property to an individual, and prohibiting the granting of extra compensation to any public office, a constitutional amendment was passed in November of 1951 authorizing legislation increasing the amount of pensions, and in 1959 this constitutional authorization was broadened to include the increasing of widow's pension. The court, however, held that the Constitution prohibited the increase of pension benefits to the petitioner's husband in the form of a pension for his widow since any compensation or pension added after the services of her husband were completed in 1946, constituted a prohibited gift or extra compensation. The court reasoned that although pensions given in consideration of

services not fully recompensed when the services are rendered are not gifts of public funds, compensation paid over and above that fixed by contract or by law when the services are rendered constitutes extra compensation. The decision of the Arizona Supreme Court in Yeazell v. Copins, 98 Ariz. 104, 402 P.2d 418 (1965) contains language suggesting the Legislature is without power to alter the provisions of a pre-existing employment contract.

A similar result was reached by the Supreme Court of the State of Washington in Sonnabend v. City of Spokane, 53 Wash. 2d 362, 333 P. 2d 918 (1958). The State of Washington had a constitutional provision identical to Article 4, Part 2, Section 27 of the Arizona Constitution, and in the aforementioned opinion the Court held that a 1957 law purporting to increase police pensions was violative of the above constitutional provisions. Thereafter, the Constitution of the State of Washington was amended to permit the increase in the amount of pensions, "After such pensions shall have been granted", and legislation was passed increasing pension allowances to retired policemen. The court upheld such legislation in Luders v. City of Spokane, 356 P.2d 331 (Wash. 1960). The amendment of the Constitution of the State of Washington was apparently felt to be essential in light of the Washington Supreme Court's decision in Smiley v. City of Tacoma, 335 P. 2d 50 (Wash. 1959), wherein the court held that a cost of living increase in pensions constituted an unlawful delegation of legislative power without sufficient standards. A similar conclusion has been reached by the Supreme Court of the State of Oklahoma which has held that the right of a claimant to a pension is controlled by the statute in effect when the right to a pension vests. Ross v. Board of Trustees of Police Pension v. Burns, 348 P.2d 1067 (Okla. 1960).

However, in Fraternal Order of Firemen of Wilmington v. Shaw, 196 A. 2d 734 (Del. 1973), legislation was passed which purported to increase pensions payable to firemen and widows of deceased firemen who had retired prior to or would retire subsequent to the effective date of the Act. The Firemen's Association sought to enjoin the payment of such increased pensions. Delaware has a constitutional provision similar to Article 9, Section 7 of the Arizona Constitution, prohibiting the lending of the State's credit to private individuals. The court nevertheless held that the purpose of this constitutional provision is

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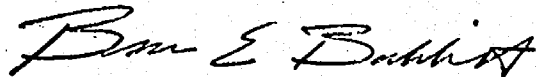
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to prohibit the use of public funds for "private purposes". Thus, if the Act in question serves a public purpose, it is not violative of this provision. In light of the recent inflationary trend experienced in the economy, the court held that the pension increase provided for constituted a valid public purpose. The court noted, however, that Delaware did not have a constitutional provision preventing the payment of "extra compensation" to former public employees who had retired prior to the effective date of the Act.

There is language in City of Tempe v. Pilot Properties, Inc., 22 Ariz. App. 356, 527 P.2d 515 (1974), indicating that Article 9, Section 7 of the Arizona Constitution makes no distinction between "donations", whether they be for a public purpose or not, but prohibits them all.

In conclusion, in light of the apparently irreconcilable conflict in the authorities, it is virtually impossible to predict the outcome of litigation testing the constitutional validity of House Bill 2179. An authoritative determination of the validity of this legislative question at hand should, therefore, be left to the appellate courts of the State of Arizona.

Sincerely,



BRUCE E. BABBITT
The Attorney General

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